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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. [redacted]393

LESTER E. BANNING,
Petitioner and Cross-Respondent,
vs.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner

CROSS-PETITIONER'S REPLY TO CROSS-RESPONDENT'S ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI; AND SUPPLEMENTAL BRIEF

CLIFFORD B. LONGLEY,
HENRY C. BOGLE,
HAROLD A. JOHNSON,
Counsel for Cross-Petitioner,
1400 Buhl Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 170 East Lernard St., Detroit 26, Michigan

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 771

LESTER E. BANNING,
Petitioner and Cross-Respondent,
vs.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner

CROSS-PETITIONER'S REPLY TO CROSS-RESPONDENT'S ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI; AND SUPPLEMENTAL BRIEF

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Cross-respondent (page 7 of his answer to the cross-petition) cites the trial court's memorandum in support of his claim that the evidence was sufficient to warrant the submission of the alleged issue of excessive speed to

the jury. We have already covered in detail our reasons for claiming that such issue should not have been submitted (cross-petitioner's brief, pp. 32-39). It will be noted that the trial court refers to plaintiff's testimony "that the speed of the two dropped cars was much greater than any similar operation which he had theretofore experienced"; but this testimony relative to other flying switches in which plaintiff had participated was the very testimony that the Court of Appeals found was improperly admitted because there was no showing that the circumstances, distance, grade, or other conditions of such previous operations were similar to the one in question (R. 411).

While the Court of Appeals did find that it was proper to submit this issue of excessive speed to the jury, it appears to have based such finding on the ground that there was a conflict in the evidence as to the speed at which the switching operation was performed (R. 408). As we have already pointed out, there was no conflict in the testimony as to the speed at which the box cars were traveling when they were cut loose from the switch engine, and this was the only point at which the rate of speed, as bearing on defendant's negligence, would be pertinent. For the purpose of this cross-petition, we have accepted Banning's testimony as to the speed at which the cars came in contact, as well as the rest of his account. Accepting Banning's testimony as true, we submit that there is no testimony from which the conclusion could be drawn that the railroad was negligent in dropping the cars at an excessive speed, but that Banning's testimony is entirely consistent with failure of judgment or negligence on his own part (cross-petitioner's brief, pp. 38-39).

Petitioner (p. 11 of his answer) attempts to develop a question of fact as to the speed of the box car at the cross-

ing, as between the testimony of fireman Hitchingham and flagman Smalley. Hitchingham did not testify as to the speed of the car at the crossing but to the speed of the car at the time it was cut loose from the switch engine (and here he agreed with the plaintiff). Smalley did not testify as to the speed of the car when it was uncoupled because he was several hundred feet away at the crossing. He did testify to the speed at the crossing, but we reiterate that we are not relying on his testimony, which is in conflict with that of the plaintiff, but are accepting plaintiff's own statement as to the speed at the crossing.

ADDITIONAL COMMENTS

Plaintiff (petitioner) has created some confusion by attempting to inject a discussion of the so-called "mud issue" into his answer (pp. 11-13 thereof) to the cross-petition, which latter involves only the issue of alleged excessive speed. This subject he also attempts to argue in his reply to cross-petitioner's answer to the original petition. In addition to this, he states (p. 14 of his answer to the cross-petition) that "on page 25 of its brief in support of its cross-petition for certiorari, cross-petitioner vagrantly raises the question of the excessiveness of the verdict." Reference, however, to the printed document heretofore filed by us will show that we mention briefly the matter of the claim made by us upon the appeal to the Court of Appeals that the verdict of the jury was grossly excessive in that part of such document that constituted our brief in reply to plaintiff's original petition and not in support of our cross-petition.

In order to avoid further confusion, we segregate our comments in respect of these subjects under the above heading as follows:

Petitioner argues that the Court of Appeals reversed the judgment because the trial court used the phrase "in two respects" instead of the phrase "in this respect" (see p. 13 of his answer and p. 7 of his reply). A fair reading of the opinion of the Court of Appeals (R. 406-412) will show clearly that that court was not guilty of such legal legerdemain. The following phrase quoted from that opinion will suffice to show why that court found that this issue should not have been submitted to the jury:

> "The fact that appellee got mud on his boots while working during or after a rain is not in our opinion any evidence of failure on the part of the carrier to furnish the appellee a safe place in which to work. Nor does the evidence show in any way that appellee was required to work thereafter without being afforded an opportunity to counteract any danger resulting therefrom. He had ample opportunity while waiting on the engine to clean his boots of mud. He was where he could talk to the engineer, and the conditions were such that he could have requested and received any additional time needed for freeing his boots of mud if they needed such cleaning. It was some time later and in an entirely different location when the accident happened. The two incidents are entirely separate and distinct" (R. 410).

We will not here repeat our argument on this point (pp. 11-25 of respondent's brief in reply to petition for writ of certiorari), showing clearly not only that there was no evidence of negligence on the part of the railroad in this respect, but that according to plaintiff's own testimony, the mud on his boots, if any, had absolutely nothing to do with the accident.

As to the matter of damages which petitioner mentions on page 14 of his answer, we merely pointed out (p. 25

of our brief in reply to the original petition) that the Court of Appeals had not actually passed on that question, and that we wished only to preserve the point.

That petitioner has wholly misconceived the rule whereby the submission of one unsupported issue renders a general verdict bad, is evidenced by his continued citation of such cases as the Bigelow case (p. 2 of petitioner's reply to respondent's answer). As we have already pointed out (pp. 16-18 of our original brief), such cases have no bearing on this question.

In answer to our position that petitioner's failure to question certain rulings of the Court of Appeals is fatal to his petition (pp. 7-10 of our original brief), the petitioner asserts in his reply (pp. 5-7) that these various rulings of the Court of Appeals were merely dictum.

Inasmuch as these three rulings each constituted an adjudication on a point within the issues of the case, and are clearly intended to be binding on the lower court, they certainly do not constitute *dicta,* see *21 C. J. S.*, p. 314. Every one of these three rulings was obviously on a material point, for example, the ruling by the Court of Appeals that Banning should not have been allowed to compare the speed with which other switchings had been made with that in the present case because no foundation had been laid for such comparison. That this is very material is evident from the fact that plaintiff relies upon this evidence in support of his claim that the speed was excessive.

On pages 5-6 of petitioner's reply, he makes the claim, in respect to Banning's testimony about the speed at the point of impact, that "the gist of the testimony complained of was in the record without objection." On direct examination defendant's counsel repeatedly objected

to questions of this kind and was overruled by the court (R. 59-60). We submit that after such repeated objections and ruling, there was no further obligation on defendant's counsel during the trial to continue such objections when the same question was asked by the court; and it is to the latter question, that is, by the court (R. 96), that petitioner refers to in his reply.

It should be noted that the quotation made by petitioner (see page 5 of his reply) of the court's question and petitioner's answer thereto from page 96 of the record is not correct. Petitioner therein quotes as a part of Banning's answer as follows:

> "I had been in a similar operation and situation 15-20 times before when we made drops of that sort; after the contact my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose."

A reference to page 96 of the record shows that actually plaintiff's answer to the court's question did not contain this quoted statement, but consisted solely of the following:

> "A. Yes, sir. There was a great contact. They came together with a greater force than I ever experienced on before."

Thereupon the colloquy between the court and plaintiff (petitioner) continued as follows:

> "The Court: I don't know whether you were asked that or not, but can you tell us about how many times during the time that you were employed by the defendant in the capacity of brakeman or switchman have you been in a situation comparable to the one you described in this case, standing on the platform and gripping the brake wheel with both

hands when shunting or when a fly switch was being made?

"A. Well, as I said yesterday, there was about 15 or 20 times that we had made drops of that sort, where practically the same procedure had been operated in dropping those cars.

"The Court: You testified yesterday, I believe, that after the contact, you just felt yourself going down. Is that what you said?

"A. After my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose.

"The Court: All right."

It will be noted from the above that there is no statement by the witness to the effect quoted in petitioner's reply, namely, that he "had been in a *similar operation and situation* 15-20 times before when we made drops of that sort * * *" (italics ours). On the contrary, the court's questions were directed to the similarity in regard to plaintiff's stance and grip on the brake platform.

A reference to plaintiff's direct examination (R. 58-59) will show that while plaintiff testified that he had engaged in flying or drop switches on some 25 or 30 other occasions, he did not testify as to any similarity of situation, circumstances, grade, distance, etc. On the contrary, the cross-examination of plaintiff (R. 74-75) shows that the circumstances pertaining to the other drop switches in which he had had experience were, in fact, different from those in the present case. He had not made any in this particular vicinity, and most of those he had made were in Ohio, and he himself states that "on the road to Springfield there are several stub tracks that the cars have to be dropped to get them in there because the engine is heading south and the cars are on the north end of the engine"; and while the general operation of dropping the

box car was similar, he says in answer to the specific question as to the distance involved on these other occasions (R. 75):

> "A. A lot of times there wouldn't be any cars to couple on. Lots of times we were setting off loaded cars or empty cars to be loaded.
>
> "Q. Did you apply the brakes?
>
> "A. Yes, and then the engine would shove them on down and place them before the warehouse doors or granaries or anywhere else they might go.
>
> "Q. Can you name any other place you had done the same thing?
>
> "A. Hainler, Ohio; different places down there, Ottawa, Ohio. There is just one switch in Ottawa and that is true of the other places I mentioned. Also in Lima, Ohio. It is just this one point there where I have made the drop track, yes."

One looks in vain for any testimony in regard to any other switching of this sort performed by petitioner where the distance, grade, etc. were substantially similar. The required speed at which a drop switch might be made where (as in the present case) the distance to be travelled by the cars switched is several hundred feet and where the track at the beginning is slightly up-grade, if anything, would obviously be much greater than that required for dropping cars into a side track for a distance of perhaps a few feet and where the cars were not to be coupled on to any standing train.

The above illustrates quite plainly the materiality of the ruling of the Court of Appeals that the proper foundation for comparison had not been laid. In fact, it demonstrates that plaintiff (on cross-examination) was absolutely unable to lay any such foundation.

We have felt obliged to call attention to the foregoing, but we shall not here be drawn into an argument in

respect of the propriety of the various rulings of the Court of Appeals in regard to the three errors now under discussion, for as we pointed out in our original brief (p. 10), Supreme Court rule 38-(2) provides that "only the questions specifically brought forward by the petition for writ of certiorari will be considered." These questions were not mentioned in Banning's petition for writ of certiorari, and respondent, in not arguing the merits of these rulings, has relied upon this rule.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied and the cross-petition for a writ of certiorari should be granted.

CLIFFORD B. LONGLEY,
HENRY C. BOGLE,
HAROLD A. JOHNSON,
Counsel for Cross-Petitioner.